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No. 04-70

Supreme Court, U.S.
FILED
AUG 31 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs acknowledge the mature conflict among the circuits on the question whether federal courts with diversity jurisdiction have supplemental jurisdiction over the individual claims of class members that do not satisfy the amount-in-controversy requirement. Opp. 21. And, plaintiffs do not dispute that this question of federal jurisdiction is recurring and important. Indeed, another petition raising the closely related question whether a federal court with diversity jurisdiction has supplemental jurisdiction over the individual claims of multiple parties that do not satisfy the amount-in-controversy requirement is also pending before this Court. See Petition for Certiorari, *Ortega* v. *Star-Kist Foods, Inc.*, No. 04-79 (U.S. filed July 16, 2004). Instead, ignoring that the courts below decided the supplemental-jurisdiction issue without encountering any obstacles, plaintiffs cite three reasons that this case is not "an appropriate vehicle to review the issue." Opp. 21. All lack merit.

Plaintiffs' initial contention is that the Court should not grant the petition because the parties' legal positions do not match their institutional profiles. Exxon, a large corporation which usually favors federal-court jurisdiction over class actions, seeks state-court jurisdiction, while the class is represented by class counsel who usually favor state-court jurisdiction. This is no reason to deny review where both parties clearly have concrete, substantial interests in pressing their positions. Plaintiffs' related contention – that Exxon lacks a sufficient stake to seek certiorari because its liability would be the same in federal and state court – is also wrong. Exxon has an obvious interest in the resolution of claims against it by a court with power to do so. Moreover, the federal judgment of liability, based on an improper conflation of the laws of several states, should not bind individual state courts which would apply their own law to plaintiffs' state-law claims. It is also uncertain who would file a state-law

claim, whether a state court would certify a class in this matter, or how state-court jurisdiction would alter aggregate damages. Finally, plaintiffs' alleged alternative ground for supplemental jurisdiction here was rejected below, and is clearly wrong. This case thus provides the Court with an excellent opportunity to resolve an issue bedeviling the courts of appeals for years.

The same is true for the class-action issue presented here. Plaintiffs make no serious case for the proposition that all is well and settled in the world of class-action litigation, and it is not. Recent events demonstrate how dangerous it is certify a nationwide class asserting state-law claims. Even though the class members' claims are governed by the laws of 37 different states, the district court certified a single, nationwide class of dealers by literally inventing a single liability standard that bears no relation to the conflicting liability standards actually applied in the various states' laws. Just last week, the Texas Supreme Court adopted, as applicable to "open price" term claims under U.C.C. § 2-305 like those asserted in this case, a standard that directly conflicts with the standard applied by the courts below. But, because the nationwide class certification here presupposed the application of a single standard that *ignored* state law, the Texas-based claims in this case will *not* be governed by Texas law – an irrational result that violates both Exxon's rights and the federalist principles that bind federal courts sitting in diversity. The example is merely illustrative: the standard adopted last week by the Texas Supreme Court is the majority rule *already* applied in the various states.

Thus, this case is an object lesson in the lengths to which some courts will go to facilitate all-or-nothing nationwide litigation, even when the class members' claims would be treated differently if litigated individually in the states in which they arise. Plaintiffs' opposition brief, in turn, illustrates the lengths to which *they* will go to avoid review of

the important class-action procedural issues presented here. Plaintiffs mischaracterize the Petition and the precedents but, in the end, cannot deny that the lower courts sorely need guidance concerning the proper application of Rule 23's requirements. The petition should be granted.

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE MEANING OF THE SUPPLEMENTAL JURISDICTION STATUTE.

As noted, plaintiffs acknowledge that the supplemental-jurisdiction issue is worthy of review and limit their opposition to three meritless attempts to show that this case is not a perfect vehicle.

Plaintiffs' first argument that the petition should be denied rests on an extraordinary syllogism: (i) Exxon is a large corporation, and plaintiffs are represented by the class-action bar; (ii) large corporations generally prefer federal jurisdiction over class actions, while the plaintiffs' class-action bar generally prefers state courts; and (iii) thus, Exxon is not an "appropriate standard bearer" for state-court jurisdiction over class actions, and class counsel is not "appropriately cast as the spokesman of the world's multinational corporations." Opp. 21-22.

Initially, it is nonsensical to argue that because Exxon often prefers to be in federal court, it is somehow disabled from arguing effectively in favor of state-court jurisdiction in a particular case where the issue has been decided adversely to Exxon, to its substantial detriment. If proof were needed, Exxon's persistent litigation of the issue at every possible stage in this case entirely belies plaintiffs' contention.[1]

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[1] To support the argument that Exxon "regularly criticizes the class action bar for taking the very position that Exxon espouses here," Opp. 21, plaintiffs cite an article not by Exxon, but by the American Tort Reform Association. *Id.* at 21 n.12. Moreover, plaintiffs cite nothing in support of their insinuation that Exxon's general support for the Class Action

Moreover, plaintiffs' counsel cannot file a case in federal court, defend federal jurisdiction over all unnamed class members' claims, and then convincingly assert in this Court that their institutional interests now preclude a vigorous defense of that legal position. Under our Constitution, courts decide particular cases and controversies. See Const. art. III. Absent estoppel or an ethical violation by counsel (neither is asserted here), the parties' legal and political predispositions are not relevant to whether a petition should be granted.

Second, plaintiffs claim that "Exxon has no financial stake in the outcome of the issue here" because state courts would be required, as a matter of law, to conclude that Exxon is liable for breach of contract. Opp. 22. Critically, indeed dispositively, Exxon has an evident, important stake in having claims decided only by a court with the power to do so. In addition, plaintiffs' claims arise under state law; the question of whether, and the extent to which, a state court would be bound by the federal courts' liability decision is entirely unclear. See generally 18B Wright et al., *Federal Practice and Procedure* § 4472, at 379 (2d ed. 2002) ("[A]lthough federal law must ultimately control the choice, . . . it is frequently appropriate to incorporate state preclusion rules into federal preclusion rules for federal judgments on state-law questions"). As the Petition shows (23-28), in deciding plaintiffs' claims, the federal court applied generalized, invented rules of law – not the individual state laws that should have governed plaintiffs' claims. See also *infra* at 7-10. Exxon would strongly contest preclusion based on federal *or* state-law principles. See *Parklane Hosiery* v. *Shore*, 439 U.S. 322 (1979). Nor can plaintiffs know who will file state-court actions, whether the state courts will certify class actions, or the effect of state-court jurisdiction on aggregate damages. Thus, the notion that Exxon lacks a sufficient "'personal stake in the outcome of th[is] controversy'" to

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Fairness Act, S. 2062, 108th Cong. (2004), somehow precludes Exxon from defending its interests in this specific case.

have standing to pursue its jurisdictional challenge (Opp. 22) is obviously wrong. Exxon is subject to a judgment that may potentially result in a liability of millions of dollars, providing Exxon with a strong, concrete "interest" in overturning the federal court's wrongful exercise of supplemental jurisdiction.

Finally, plaintiffs contend that the Court should not take this case because an alternative ground supports the exercise of supplemental jurisdiction. Specifically, plaintiffs argue that the class has a "'common and undivided interest'" in the money judgment rendered because Exxon "'owe[d] an obligation to the group of plaintiffs as a group and not to the individuals severally.'" Opp. 23 (quoting *Morrison* v. *Allstate Indem. Co.*, 228 F.3d 1255, 1262 (11th Cir. 2000)). The short answer is that the argument was rejected by both lower courts. See App. 110a ("Is this a 'Common Fund' Case Upon Which a Aggregate Final Judgment Can Be Entered? The answer is 'no.'") (emphasis in original omitted); *id.* at 77a-80a (refusing to enter "an aggregate final judgment in this case"). Distinguishing the same cases cited by plaintiffs, the district court explained:

> [W]hat is missing to create a 'common fund' is the *res* itself, such as a piece of land, an insurance policy, a lien, or an item of collateral, which the plaintiffs might claim as common owners or in which they might share a common undivided interest arising under a single title or right. . . .
>
> . . . .
>
> Plaintiffs may not equate a class member's interest in the total damage award sought by the class with the "joint and undivided" interest in a single claim or "res," as required by *Morrison*, and thereby justify entry of an aggregate judgment. [App. 110a-111a.]

None of the reasons plaintiffs cite for denying review withstands even cursory scrutiny.

II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE MEANING AND PROPER APPLICATION OF RULE 23.

Plaintiffs rest their opposition to review of the class action question largely on a superficial defense of the merits of the class certification order: Exxon treated its dealers as a class, plaintiffs aver, so it necessarily follows that class certification was proper. *Plaintiffs'* theory, however, is that Exxon adopted the DFC program not because it wanted to treat all dealers tne same, but because it wanted to treat them *differently*. Opp. 5 (discussing Exxon's asserted division of dealers into "'keepers' and 'non-keepers'").

This inconsistency in plaintiffs' position effectively highlights the fundamental legal flaw in the class certification order here: by forcing Exxon to deal with the dealers' claims on an all-or-nothing basis, the order deprived Exxon of the opportunity to assert viable defenses against each individual dealer's claim. For instance, under plaintiffs' theory that Exxon breached "its obligation to reduce prices 'on average' . . . 'over time and across markets,'" Opp. 8, it is necessarily true that many dealers *did* receive the benefits of a price reduction. Plaintiffs' point is that some did (the "keepers") and some did not (the "non-keepers"), and that Exxon left so many in the latter category that, *on average*, the dealers "as a class" did not receive the benefits of the DFC offset. But if Exxon had been allowed to defend against the claims on an individualized basis, it would have been permitted to show that given dealers received the benefits of a price reduction during the class period. But, when individual claims are amalgamated under a theory of "on average" classwide price reductions, then the meritless individual claim of a dealer who received a full price reduction is counterbalanced by the claims of two dealers who did not; and yet all three somehow walk away with damages from Exxon.

The class-action device was originally intended to facilitate the litigation of small-value individual claims that otherwise would not be brought. In this case, it was used to facilitate the litigation of *large*-value individual claims (plaintiffs say the vast majority are over $50,000) that otherwise *would not exist*. That is a perversion of Rule 23.

This is equally true with respect to Exxon's key affirmative defenses. Plaintiffs do not deny that Exxon would have an irrefutable statute of limitations defense against many of the class claims had they been brought individually, unless the individual dealer could establish all the elements of fraudulent concealment to avoid the statute of limitations. But rather than require each individual dealer to provide individual proof, the courts below certified a class and allowed dealers to prove those elements on a single-law, all-or-nothing basis. As the Petition explains, that decision conflicts directly with decisions of the Fourth and Fifth Circuits, which reject class certification where class members would be required to prove fraudulent concealment to equitably toll a statute of limitations, but conforms to decisions in the First and Third Circuits, which allow class certification in the same circumstances. Pet. 22-23.

Plaintiffs address only two of these cases,[2] and contend that the conflict between them is based on the "unique facts and circumstances" of the cases, "not on disparate rules of law." Opp. 18. That is incorrect. The Fourth Circuit decision established an unequivocal rule that "when the defendant's 'affirmative defenses (such as . . . the statute of limitations) may depend on facts peculiar to each plaintiff's case,' class certification is erroneous," *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998) (omission in original) (internal quotation marks omitted), and the First Circuit expressly "reject[ed]" the Fourth Circuit's holding, *Waste Management Holdings, Inc.* v. *Mowbry*, 208 F.3d 288, 296 n.4 (1st Cir. 2000), which obviously would

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[2] Plaintiffs' assertion that only two decisions address limitations avoidance on concealment grounds (Opp. 18) is patently wrong.

have been unnecessary if the cases could be reconciled on factual grounds. As a careful reading reveals, the class-certification decisions turned fundamentally on the courts' conflicting judgments as to whether individual reliance issues conclusively preclude class certification.

The courts below answered that question "no," but only because they refused to follow the unambiguous requirement of many jurisdictions that an individual seeking to defeat the statute of limitations prove that he or she personally relied on the asserted misrepresentation. Pet. 25 & nn.6-8. Plaintiffs do not deny that the courts below refused to require proof of actual reliance by any individual dealer, even as they concede that such proof is an element of tolling in many jurisdictions. Opp. 19. In light of those positions, plaintiffs' statement that "the Eleventh Circuit did not ignore state law" in refusing to require proof of individual reliance, *id.*, is incomprehensible.

Plaintiffs weakly defend the refusal to require proof of individual reliance on the ground that in just four of the many jurisdictions that require proof of individual reliance, there are "reported decisions concluding that reliance can be established on a class-wide basis." *Id.* at 19-20. On its face that contention obviously does not justify the refusal to follow state law in *other* jurisdictions that reject a presumption of reliance in class-action cases. In any event, the cases plaintiffs cite are of little help to them: two are old cases that have been supplanted by recent authority in their respective jurisdictions clearly holding that where, as here, the disposition of class members' claims requires proof of personal reliance, such reliance will *not* be presumed, but must be proved by every class member. *Mirkin* v. *Wasserman*, 858 P.2d 568, 574 (Cal. 1993); *Reich* v. *Mitrani Plasterers Co.*, 701 N.Y.S.2d 368, 369 (N.Y. App. Div. 2000). The decisions below flatly override the state-law requirement of those two major jurisdictions. Plaintiffs cite two other lower court decisions from smaller states, holding that reliance may be "presumed" in the class-action context,

but nothing in Rule 23 authorized the courts in this case to impose such a principle on every claim, regardless of its state of origin. To the contrary, Rule 23 required those courts to respect and enforce the policy decisions of every state in which the dealers' claims arose, including those that preclude recovery on time-barred claims absent individual proof of reliance on asserted misrepresentations.

To avoid another legal disuniformity that would have precluded class certification, the courts below applied a lay dictionary definition of the word "normal" that cannot be found in any state's law applying the U.C.C. term of art "normal case."[3] In response, plaintiffs cite not one legal precedent justifying the application of a fabricated federal rule to each class member's state-law claims. Because all agree that that the definition of "normal case" applied by the courts below to facilitate classwide litigation is not derived from the law of *any* state, plaintiffs' effort (Opp. 17-18) to deny a conflict in state law over the definition of "normal case" is almost beside the point. Nevertheless, the Texas Supreme Court's recent opinion in *Shell Oil Co.* v. *HRN, Inc.*, No. 03-0555, 2004 Tex. LEXIS 740 (Tex. Aug. 27, 2004), on the "normal case" question starkly illustrates the deep flaws in the class-certification order here. Like this case, *Shell* involved a claim by gasoline dealers that an oil company had wrongfully employed a DFC program to drive them out of business. Cf. Opp. 4 (discussing Exxon's allegedly nefarious goals). In *Shell*, the Texas Court explicitly rejected the Fifth Circuit's holding in *Mathis* v. *Exxon Corp.*, 302 F.3d 448 (5th Cir. 2002), that subjective bad faith alone suffices to make a case not "normal." The *Shell* Court followed the "majority of decisions" and held that, if the posted price is not commercially unreasonable or discriminatory, the case is per se "normal," *even if* there is an "'improper motive animating

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3 Plaintiffs' waiver argument (Opp. 16) is meritless. *See* Appellant's Br. in Nos. 01-15575-AA & 01-16244-AA, at 32-35 (11th Cir. filed Mar. 5, 2002).

the price-setter,'" including "dishonesty." 2004 Tex. LEXIS 740, at *12, *14, *16. The special lay-dictionary rule adopted by the courts below to facilitate nationwide class treatment of the dealers' pricing claims does not reflect that majority standard, and runs roughshod over the policy choices of the many states – such as Texas – that interpret U.C.C. § 2-305 to restrict proof of bad faith solely to objective evidence of actual prices charged.

Finally, plaintiffs misapprehend the jury-trial problem raised in the Petition. The point is not that "the district court deprived [Exxon] of a jury trial *in the claims administration process*." Opp. 16 (emphasis added). Instead, the class certification deprived Exxon of a jury trial *during the trial process*. Exxon's waiver of a jury trial on damages came *after* the trial, in which Exxon's "liability" had already been determined on a classwide basis. The problem is that the courts below, in certifying the class *before trial*, assumed that a jury could determine Exxon's "liability" separately from its "damages," with no risk to Exxon's right to mount an individualized defense to each dealer's claim before that jury. But in this context, damages and liability are *not* severable: Exxon owes an individual dealer damages only if Exxon "overcharged" that dealer, and Exxon thus is entitled to establish whether that dealer was, in fact, overcharged. Because the classwide treatment of plaintiffs' on-average pricing theory precluded Exxon from addressing the prices charged to individual dealers, it deprived Exxon of a jury trial on its liability to those individual dealers.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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